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THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

Paper No. 12
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Ginger Strong d/b/a Rubicon Orchards

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Serial No. 75/523,866

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Michael H. Baniak of Baniak Nicholas Pine & Gannon for Ginger Strong d/b/a Rubicon Orchards.

Danielle I. Mattessich, Trademark Examining Attorney, Law Office 101 (Jerry L. Price, Managing Attorney).

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Before Simms, Hohein and Hairston, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Ginger Strong d/b/a Rubicon Orchards has filed an application to register the mark RUBICON for "wholesale fresh market tree grown fruit and live fruit trees."[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the

[1] Serial No. 75/523,866 filed July 23, 1998, based upon applicant's bona fide intention to use the mark in commerce.

ground that if applicant's mark were used in connection with wholesale fresh market tree grown fruit, it would so resemble each of the following marks, which are registered to different entities, as to be likely to cause confusion, mistake or deception:

RUBICON for "wines"[2] and

for "non-alcoholic fruit juice beverages; fruit-flavored beverages, and coconut water."[3]

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

We turn first to the question of likelihood of confusion vis-à-vis Registration No. 2,090,926 for, in particular, non-alcoholic fruit juice beverages, since to us this is the most pertinent of the cited registrations.

With respect to the similarity of the marks, we note that applicant's brief is silent on this factor. We find that this amounts to a tacit concession that the marks are virtually identical, as the Examining Attorney maintains.

[2] Registration No. 1,572,288 issued December 19, 1989; renewed.
[3] Registration No. 2,090,926 issued August 26, 1997.

Turning then to the goods, applicant argues that there is no likelihood of confusion in this case because the trade channels of the respective goods are completely different and her goods are bought by sophisticated purchasers. Applicant submitted two declarations wherein she states that based on her experience in the fruit growing industry, wholesale buyers of fresh fruit are sophisticated purchasers and the channels of trade for wholesale fresh fruit and fruit juices are different. In addition, applicant states that there have been no instances of actual confusion.[4]

The Examining Attorney, on the other hand, maintains that wholesale fresh fruit and fruit juices are related products because fruit is an ingredient in fruit juices and such goods are often sold under the same mark by the same manufacturers. Further, the Examining Attorney maintains that applicant's argument that applicant and registrant will not share the same channels of trade is not well taken inasmuch as the cited registration contains no restrictions.

As has been frequently stated, it is not necessary

[4] Although this is an intent-to-use application, we note that applicant indicates in her second declaration that she has begun use of the mark.

that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Further, the Board has stated in the past that "[i]f the marks are the same or almost so, it is only necessary that there be a viable relationship between the goods or services in order to support a likelihood of confusion." In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983).

In this case, given the absence of any limitations in the cited registration, we must presume that registrant's fruit juice beverages are bought by the same purchasers as wholesale fresh fruit, e.g., grocery stores, gourmet food shops, and small food markets, and that such goods move in the same channels of trade.

Also, the Examining Attorney has submitted a number of use-based third-party registrations which show that fresh fruit, on the one hand, and fruit juices, on the other hand, may emanate from the same source under the same mark. For example, the mark SOUTHERN HOME is registered for fresh fruit, fruit juices and fruit flavored drinks; JUICE EVOLUTION is registered for fresh fruits and fruit juices; APPLE HILL is registered for fresh fruit and fruit juices; and DEWY-FRESH is registered for fresh fruits and frozen fruit juice.

In view of the foregoing, we find that the respective goods are sufficiently related that purchasers familiar with registrant's fruit juice beverages offered under the mark RUBICON in stylized letters, would be likely to believe, upon encountering RUBICON wholesale fresh market tree grown fruit, that the goods originate from the same source. An additional factor we have considered in reaching our decision is that RUBICON is an arbitrary mark as used in connection with fruit juice beverages. It is well settled that arbitrary marks are accorded a wide orbit of protection. See Aero Mayflower Transit Company, Inc. v Snack Products, Inc., 190 USPQ 100 (TTAB 1976). In addition, even if we had any doubts on the issue of likelihood of confusion, such doubts would necessarily be

resolved in favor of the registrant and against applicant as the newcomer. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Two additional arguments made by applicant require comment. First, while we recognize that purchasers of wholesale fresh fruit may be expected to exercise a certain degree of care in making their selections, such purchasers are not immune to source confusion, especially where related goods would be marketed under virtually identical marks.

Second, applicant's argument that confusion is not likely because applicant is not aware of any incidents of actual confusion does not persuade us that no likelihood of confusion exists in this case. We cannot determine on this record that there has been any meaningful opportunity for actual confusion to have occurred in the marketplace, and accordingly we cannot conclude that the alleged absence of actual confusion is entitled to significant weight in our likelihood of confusion analysis in this case. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992).

We turn next to the question of likelihood of confusion vis-à-vis Registration No. 1,572,288 for wines.

Although applicant's mark and the mark in such registration are identical, we are not persuaded that wholesale fresh market tree grown fruit and wines are sufficiently related that confusion is likely. We note that the Examining Attorney made of record two used-based third-party registrations which cover fresh grapes, on the one hand, and wine, on the other hand. However, this evidence is insufficient to convince us that a wine producer would also sell fresh fruit and vice versa.

Decision: The refusal to register based on Registration No. 2,090,926 is affirmed; the refusal to register based on Registration No. 1,572,288 is reversed.